IN THE

Supreme Court of the United States

No. 439

IRENE SMITH CLIETT, ET VIR, *Petitioners*

v.

JEFF SCOTT, ET AL., *Respondents*

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS, FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinions and Judgments Below

The opinion of the United States Court of Appeals, Fifth Circuit, is reported in —— F. 2d ——, and appears as Appendix I to the Petition for Writ of Certiorari herein. The memorandum opinion of the United States District Court, overruling Petitioners' Motion to Remand, appears as Appendix IV to the Petition for Writ of Certiorari herein.

Jurisdiction

The opinion of the United States Court of Appeals was rendered and entered on May 15, 1956, as was the judgment of that Court affirming the United States District

Court. Petition for Writ of Certiorari was filed herein on September 21, 1956; invoking the jurisdiction of this Court under 28 *U.S.C.A.*, Sec. 1254 (1).

Questions Presented

1. Whether the United States Court of Appeals correctly found and held herein that when Petitioners, in and by their amended complaint, sued Respondent (all of whom were non-residents of the State of Texas) upon an entirely new and different cause of action, Respondents were entitled to remove such suit to the Federal Court although they had theretofore answered the original complaint or petition in the State Court and asserted counter-claims and offsets thereto.

2. Whether the United States Court of Appeals correctly found and held herein that the Respondents continued to be "Defendants" in the State Court, within the meaning of 28 *U.S.C.A.*, 1441 (a), as to new and different causes of action therein asserted against them by amended pleadings, although they had answered the original petition or complaint and had plead counter-claims and offsets as to the cause of action asserted in the Petitioners' original petition or complaint in the State Court.

Statutes and Regulations Involved

28 U.S.C.A. 1441.

Statement

I.

The record in this case shows:

1. The pertinent facts found herein by the courts below may be summarized as follows:

(a) The U. S. District Court: Petitioners' original complaint or petition filed in the State Court shows diversitive citizenship between all Plaintiffs and all Defendants; that the matter placed in controversy by Petitioners' original petition filed in the State Court exceeds the sum or value of Three Thousand and No/100ths Dollars, exclusive of interest and costs; and that Respondents did not seek to remove the cause or causes of action complained of in Petitioners' *original* petition in the State Court, but answered to the merits thereof and asserted therein a cross-action for rents and profits received by Petitioners from the subject lands, and thereby submitted themselves to the jurisdiction of the State Court "on the causes of action stated in such *Original* Petition" filed by Petitioners in the State Court and thus asserted by Respondents therein. (Italics ours).

That subsequently and on March 24, 1951, Petitioners filed their *amended* petition in the State Court, by and in which said Petitioners "set up an *entirely new* cause of action, i.e., a suit in Trespass to Try Title under the Texas Statutes", and in the alternative they sought the additional remedy of partition.

That the cause of action presented in said Petitioners' amended petition or complaint filed in the State Court presented "a cause which is new in part and was and is removable. And that Defendants (respondents), by answering in the State Court Plaintiffs' (petitioners) original petition, did not waive their right to remove." (R. 82-5).

(b) The U. S. Court of Appeals, Fifth Circuit: That Respondents did not change their technical designation as "*Defendants*" within the meaning of 28 *U.S.C.A.*, Sec. 1441 (a) to that of *Plaintiff* by asserting a counter-claim

and offset to Petitioners' original complaint filed in the State Court, so as to be precluded from removing such suit to the Federal Court upon the subsequent filing of an amended petition by Petitioners in the State Court which asserted a new and different cause of action.

That the counter-claim filed by Respondents in the State Court "was not such an independent suit as to affect the right to remove" such suit upon the filing of the amended petition therein by Petitioners herein.

That although Respondents had submitted themselves to the State Court's jurisdiction on the cause of action asserted by Petitioners in their original petition in the State Court, this did not prevent Respondents from removing the cause when the entirely new and different cause of action was subsequently asserted by Petitioners in their amended petition, filed in the State Court March 24, 1951. (Appendix I, Petition for Writ of Certiorari).

2. This suit was originally filed by the Petitioners in the State District Court of Waller County, Texas, on March 7, 1941, against Flora Scott, et al., all of whom were non-residents of the State of Texas and the sole surviving heirs-at-law of George Scott, deceased. In the original petition or complaint of Petitioners so filed in said State Court, they therein asserted a right to be reimbursed for one-half of the purchase price paid for the lands therein referred to and for one-half of the costs of repairs and improvements and taxes paid upon such lands; which were the selfsame lands as constituted the subject matter of Cause No. 7891, *Scott, et al. versus Smith* (84 F. 2d 489), and Cause No. 8835, *Cliett versus Scott, et al.* (102 F. 2d 725, March 14, 1939), before the Honorable Court of Appeals, Fifth Circuit; and in which said cases, these Re-

spondents were decreed to be the owners of an undivided one-half interest in and to such lands, and in which said cases there was determined and adjudged, or there should have been determined and adjudged all issues with respect to any rights of the Petitioners herein to reimbursement for one-half of the purchase price, costs of the repairs and improvements and/or taxes paid upon the subject lands prior to March 14, 1938—the date of the second trial of said case in the United States District Court. In their *Original* Petition to the State Court therein, Petitioners did not challenge the validity of Respondents' title to an undivided one-half interest in said lands in their original petition to said State Court, but, on the contrary, recognized their said interest therein by claiming the aforesaid contributions; nor did Petitioners therein seek any partition of such lands between themselves and these Respondents. (R. 26-37).

On September 29, 1947, these Respondents filed their original answer to the original petition filed by Petitioners in the State Court and therein sought, as a counter-claim, an accounting for rents and revenues from the common lands of said parties constituting the subject matter of the Petitioners' petition therein. (R. 38-53).

Thereafter and on March 24, 1951, Petitioners, who were Plaintiffs in the State Court, filed their first *amended* original petition therein, and, for the first time, they asserted a statutory cause of action in trespass to try title and claimed a right to partition. *Such were entirely new causes of action and had not been theretofore asserted* by Petitioners. (R. 53-66). Whereupon, and on April 15, 1951, Respondents timely filed their petition for removal to the United States District Court for the Southern District of

Texas, at Houston, with appropriate bond (S.F. 21 and 66); Petitioners filed their motion to remand and the same was overruled by the above said United States District Court June 1, 1951. (R. 82-6).

Petitioners admit, yea, assert:

(a) That their original petition filed in the State Court had for its "sole purpose" the determination of the force and effect of the decrees of the United States District Court and the United States Court of Appeals, Fifth Circuit, in Equity Cause No. 639, "as to the rights of Plaintiffs (petitioners) to recover money spent by Irene Smith (now Cliett) on the purchase price of said properties and on the mortgage indebtedness and on the taxes from the date of George Scott's death in 1933 until final judgment in March, 1939."

(b) That the amended petition or complaint filed by Petitioners in the State Court on March 24, 1951, was an entirely new, different and distinct cause of action and "based on entirely distinct and different transactions and occurrences" from those complained of in Petitioners' original petition filed in said State Court (Petitioners' Brief in United States Court of Appeals, pp. 18 and 19, and Petition for Writ of Certiorari, p. 2).

Argument

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court, overruling Petitioners' Motion to Remand is correct and is not in conflict with any other decision so as to warrant further review of the case by this Honorable Court; and such judgments of the Circuit Court of Appeals and of the District

Court in the instant case is in accord with and supported by the following authorities:

28 *U.S.C.A.* 1441;
Powers v. C. & O. Co., 169 U.S. 92, 18 S. Ct. 264;
Evans v. Dillingham (C.C.A.), 43 Fed. 177;
Mattoon v. Reynolds, 62 Fed. 417;
Henderson, et al. v. Midwest Refining Co. (10th C.C.A.), 43 Fed. 2d 23, 25;
Baron v. Brown (S. Dist. N.Y.), 83 Fed. Supp. 520;
Southern Pac. Co. v. Stewart, 13 S. E. 824;
Markantonatos v. Maryland Drydock Co. (D.C. N.Y. 1953), 110 Fed. Supp. 862;
Mackay v. Unita Development Co., 229 U.S. 173, 57 L. Ed. 1138;
Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 61 S. Ct. 872;
West v. City of Aurora, 6 *Wall.* 139, 18 L. Ed. 819.

In *Evans v. Dillingham, supra*, the original petition (filed September 13, 1889) in the State Court, sought injunction to prevent Dillingham, as Receiver for Houston & Texas Central Ry., from removing division headquarters of such Railway from Corsicana to Ennis. April 2, 1890 plaintiffs, filed "Second Amended Petition"; Dillingham filed petition (and bond) for removal April 7, 1890. This petition was granted by the State Court, and plaintiffs filed a Motion to Remand.

The Federal Circuit Court held that there was presented "a federal question, which defendant is entitled to have passed on by the United States Court, if he has not lost his right to remove by his delay in presenting his application therefor."

In holding that the petition for removal was filed in time, the court said (p. 180):

"There is no question in my mind that, where an amended petition makes a substantially different suit from the original petition, the limitation as to the time within which the petition for removal can be presented should relate to the new pleading of the plaintiff . . . I am of the opinion the defendant's application for removal was made in time, and the motion to remand will be refused."

In *Mattoon v. Reynolds*, supra; Mattoon and others sued Reynolds, a non-resident of Connecticut, in a State Court of Connecticut. Reynolds removed same to the Federal Court, and plaintiffs moved to remand the same. The Court therein found and said:

"The original complaint, in the state court, alleged that certain notes were given without consideration, and asked for an injunction restraining the defendant from negotiating said notes. After the time had expired within which the cause might originally have been removed, the plaintiffs filed a new count, alleging fraud, and asking for equitable relief, or for a judgment for $3,000 damages. In due season after the filing of the amended pleadings the defendant removed the cause to this court.

"The single question presented is whether, by the filing of the substituted complaint, the defendant acquired a right of removal. The determination of this question depends upon whether the amended complaint states a new and different cause of action, and one in which the original suit is merged. Yarde v. Railroad Co., 57 Fed. 913; Huskins v. R. R. Co., 37 Fed. 507; Evans v. Dillingham, 43 Fed. 177; State of Texas v. Day Land & Cattle Co., 49 Fed. 593, 596. It is clear that in this case the second count presents a distinct cause of action—fraud, calling for a distinct remedy at law; money damages. The allegations con-

tained in the first count (petition) and the relief therein prayed for are incorporated in the second count (petition).

"The motion to remand is denied."

In *Baron v. Brown*, supra; the defendants filed a counter-claim to the original petition, whereupon the plaintiffs therein amended their petition, and the defendants then and timely petitioned for removal. On Motion to Remand the Court found that the original petition alleged an action for specific performance of a contract for the purchase of a stock of merchandise; and the amended pleading alleged action for money damages for defendants' alleged breach of the contract to buy such stock of merchandise; and that under the New York law the second petition was "in the place and stead of their original complaint."

At 83 Fed. Supp. 521, the Court there held and said:

"The Federal Courts have held that where an amendment makes a substantially new complaint, the time to remove dates from the time of the service and filing of the amendment. Evans vs. Dillingham, C.C., 43 F. 177.

"Therefore, the filing of the petition to remove by the defendants some three days after the service of the supplemental complaint was timely."

Petitioners allege in their brief herein to the Circuit Court of Appeals that "The sole purpose of" the original suit filed in the State Court "was to determine the force and effect of the decrees of the trial court and this Honorable Court of Appeals of Equity, Cause No. 639 as to the rights of Plaintiffs . . ." (p. 18) and further asserted

that "The cause of action originally sued upon and the count in trespass to try title, . . . are two entirely different and independent suits and based upon entirely distinct and different transactions and occurrences." (p. 19). It is not perceived how there could be any basis for any contention on Petitioners' part or of a holding that the filing of their amended pleadings on March 24, 1951, did *not* constitute the assertion of an entirely new and independent cause of action, as was held by the District and Circuit Court of Appeals.

Assuming that the Respondents herein waived their right to remove said cause of action or actions in said original petition asserted by Petitioners herein; Respondents *did not waive their right to remove* to the Federal Court for determination *the new and independent causes of action* asserted by Petitioners in their amended pleadings filed March 24, 1951 any more than they might have waived their right to remove in a second and entirely different suit by having waived their right to remove in a prior suit filed by the same or different Plaintiffs. *Henderson v. Midwest Refining Co.;* 43 Fed. 2d 23, 25 (3, 4).

In *Henderson v. Midwest Refining Co.*, supra; the original petition alleged an equitable action in the nature of a trust. No petition for removal was then filed; but defendant's demurrer thereto was sustained. The *amended petition* alleged conspiracy, fraud and large damages.

In sustaining judgment overruling motion to remand, the Circuit Court of Appeals said (p. 25):

> "Defendant apparently was content to remain in the state court on the cause of action stated in the original petition, but that seems to be no reason for

> denying to it its right of removal of an entirely new and different cause of action pleaded in the so-called amended petition. Moreover, the time within which removal may be made is not jurisdictional, but 'modal and formal'. Ayers v. Watson, 113 U.S. 594, 5 S. Ct. 641, 28 L. Ed. 1093; Powers v. C. & O. Ry., 169 U.S. 92, 18 S. Ct. 264, 42 L. Ed. 673."

In *Powers v. Chesapeake & Ohio Ry. Co.* cited in the *Henderson* case, supra; this Court, in affirming the judgment of the Circuit Court, which held that when the plaintiff amended his pleadings and thereby dismissed a resident co-defendant of the railway company, the railway company was entitled to remove such cause to the Federal Court, even though it had theretofore joined issue on the merits in the State Court, this Court said:

> "The reasonable construction of the act of Congress, and *the only one which will prevent the right of removal,* to which the statute declares the party to be entitled, *from being defeated by circumstances wholly beyond his control,* is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought." (Italics ours)

Thus, it is seen that this Court has heretofore held that the removal statute may not be so construed as to permit a plaintiff to "bait" a defendant to answer and submit himself to the jurisdiction of the State Court by filing therein one cause of action; and thereafter amend his

pleadings and assert against such defendant a *new* cause of action; and yet require such defendant to submit to the jurisdiction of the State Court upon such new cause of action.

In *Mackay v. Unita Development Company*, 229 U.S. 173, 57 L. Ed. 1138, while not deciding that the defendant in the State Court remained the "defendant" although he asserted therein a counter-claim; this Court appeared to be of the same opinion as was the Court of Appeals herein; that is, that the original defendant in the State Court remained the "defendant" within the meaning of 28 *U.S.C.A.* 1441 (a), although he had filed a counter-claim or offset to the claims of the plaintiff in the State Court.

The aforesaid implied holding of this Court in the *Mackay* case was the *expressed holding* of this Court in the case of *Shamrock Oil and Gas Corporation v. Sheets*, 313 U.S. 100, 61 S. Ct. 868, 872. The Shamrock Oil and Gas Corporation, a Deleware corporation, sued Sheets et al., citizens of Texas, in the State Court for an amount in excess of $3000 for goods sold and delivered. The defendants therein filed a cross-action for setoff and demanded damages in a sum in excess of $3,000; prayed that the plaintiff therein take nothing, and that such defendants have judgment against the plaintiff on their cross-action in the amount of $7,200. Upon the filing of such setoff or cross-action, the Shamrock Oil and Gas Corporation filed a petition to remove the whole suit to the Federal Court on the ground of diversitive citizenship. The United States District Court overruled Sheets' Motion to Remand and rendered judgment on the merits in favor of the original plaintiff in the State Court (Shamrock Oil and Gas Corporation) and Sheets appealed. The United States Court of Appeals, Fifth Circuit, reversed the judgment of the

District Court overruling the Motion to Remand and *held* that although the original plaintiff in the State Court became a cross-defendant therein, it did not become a "defendant" within the meaning of the removal statute (28 *U.S.C.A.* 1441 (a), and that the right of removal was a right assertable only by the original defendant in the State Court. This Court granted an application for Writ of Certiorari and *affirmed such holding* of the Circuit Court of Appeals. Also therein this Court held that there was no distinction between the terms of the removal statute in effect at the time of the decision of this Court in *West, et al. v. City of Aurora,* 6 Wall. 139, 18 L. Ed. 819 (February 10, 1868) and the removal statute controlling in the *Shamrock* case, and which is now in effect. (Section 12 of the Judiciary Act of 1789, 1 Stat. 79). (61 S. Ct. 872 (4)

In *West v. City of Aurora,* 6 Wall. 139, 18 L. Ed. 819 (cited by Petitioners) this Court held that an amended answer "setting up new defensive matter" and praying for "an injunction to restrain the original plaintiffs (non-residents) from further proceeding in any suit on the coupons or bonds, and from transferring them to third parties, and for a decree that the bonds be delivered up to be cancelled," did not constitute such a new suit or cause of action by such defendant as would permit the plaintiffs, West et al., to dismiss their petition as plaintiff and remove such cause to the Federal Court. And *expressly held* that the right of removal was the right of *the defendant* and not of the plaintiff, although such plaintiff became a defendant or cross-defendant.

Thus, it seems clear to Respondents that this Court has heretofore determined that an original plaintiff in the State Court remains the "plaintiff" therein and the original

defendant in the State Court remains the "defendant" therein; notwithstanding the assertion therein of cross-actions, counter-claims or setoffs. And, therefore, the courts below in the instant case correctly held that the Respondents, although filing a cross-action for counter-claims and setoffs, remained the "defendant" in the State Court and that when the Petitioners (plaintiffs in the State Court) filed their amended pleadings asserting new and different causes of action, these Respondents were entitled to remove such cause to the Federal Court.

Reasons for Refusing the Writ

Petitioners contend that this Honorable Court should grant the writ prayed for herein: first, because this Court has not heretofore decided the point presented; and secondly, because the holding of the Circuit Court of Appeals in this case "is contrary to and in conflict with" the construction of 28 *U.S.C.A.*, Sections 1441 and 1446, by this Honorable Court in the following cases:

Charles W. West, et al. v. City of Aurora, 6 Wall. 139, 18 L. E. 819;
Merchants Heat & Light Co. v. James B. Clow & Sons, 204 U.S. 286, 27 Sup. Ct. 285, 51 L. E. 488;
Texas & Pacific Railway Co., et al. v. Eastin & Knox, et al., 214 U.S. 153, 29 Supreme Court 564, 53 L. E. 946.

The propositions made are, of course, *contradictory.* However, Respondents desire to point out the distinction between the instant case and the next above cases referred to by Petitioners.

In *West v. City of Aurora,* supra: West, et al., who were citizens of Ohio, brought this suit in the State Court of Indiana against the City of Aurora (Indiana) and were

the original plaintiffs therein. The City of Aurora, by amended pleadings, set up new defensive matter and prayed for an injunction, and for delivery of the bonds sued upon for cancellation. Thereupon, the original plaintiffs in the State Court removed the suit to the United States Circuit Court, which granted a Motion to Remand. This Court, in affirming the holding of the Circuit Court, held:

> "The right of removal is given only to a defendant who has not submitted himself to that jurisdiction; *not to an original plaintiff* in a State Court who, by resorting to that jurisdiction, has become liable under the state law to a cross-action." (Italics ours)

Thus, it is seen that the *West* case is distinguishable from the instant case in that it was the *original plaintiff* who sought to remove the case to the Federal Court, and not the original defendant, as in the instant case.

Merchants Heat & Light Co. v. James B. Clow & Sons, supra: The reported opinion does not reveal the facts and proceedings concerning the jurisdictional question, but it is believed that it may fairly be inferred that Clow and Sons, an Illinois corporation, brought this suit in the Illinois State Court against Merchants Heat and Light Company, an Indiana corporation; that the defendant therein "lost no rights by pleading to the merits, as required, after saving its rights"; that the defendant therein set up a counterclaim in the nature of recoupment rather than setoff—which was construed as a cross-demand, as distinguished from a defense—, and thereafter sought to remove the cause to the Federal Court.

This opinion as reported does not reflect, indeed does *not suggest*, that the plaintiff by subsequent and amended

pleadings in the State Court alleged or asserted new and different causes of action from those asserted in its original petition. Thus, it is seen that the basis upon which the Circuit Court and the District Court in the instant case held that the Respondents were entitled to remove this cause to the Federal Court, to-wit, the subsequent assertion by the plaintiff of *new* and different causes of action, was in nowise under consideration by this Court in the case of *Merchants Heat and Light Company v. Clow and Sons;* and that opinion could not be considered in conflict with the holding of the Circuit Court of Appeals in the instant case.

In *Texas & Pacific Ry. Co., et al. v. Eastin & Knox, et al.,* supra: Eastin, et al., sued the Texas & Pacific Co. and its resident agent for damages resulting from wrongful billing of a shipment of cattle. The Texas & Pacific Co. petitioned for removal to the Federal Court and alleged that its agent, Tucker, was improperly and unlawfully joined in the suit for the purpose of preventing removal thereof to the United States Circuit Court. The petition for removal was denied and exceptions taken and entered. The Texas & Pacific Co. continued its protest but filed an original answer and therein *impleaded* the St. Louis & San Francisco Railroad Company as a party-defendant, and by a second amended pleading alleged negligence on the part of the St. Louis & San Francisco Company and that the damage approximately resulted therefrom, and in the alternative prayed that it have judgment over and against the St. Louis & San Francisco Railroad Company for such judgment as might be rendered against it.

This Honorable Court therein held that the Texas & Pacific Railway Company "instituted *a cause of action*

against the St. Louis & San Francisco Railroad Company, *in which the defendant in error* (Eastin) *had no concern*, and recovered a judgment against that company for $1,800. *By doing so* they invoked the jurisdiction of the State Court on their own accord and for their own purpose . . ." (Italics ours).

In the *Texas & Pacific* case there was no question of subsequently asserted new cause of action; but in recognizing that the submission of a defendant to the jurisdiction of the State Court by making answer to a cause of action asserted against him in such State Court *is limited to that particular cause of action*, this Court therein said (214 U.S. 161, 53 L. Ed. 950):

> "It would be carrying too far the right of a party who has petitioned for removal of a case to extend it beyond what is necessary to defend against the cause of action asserted against him."

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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A copy of the foregoing brief has been mailed to counsel for Petitioners, Messrs. Frank O. Barnes and Sam G. Croom, 619 San Jacinto Building, Houston, Texas, on this 18 day of October, 1956.

Attorney for Respondents